Gunawan Iron & Steel Sdn Bhd v Associated Pan Malaysia Cement Sdn Bhd

HIGH COURT (KUALA TERENGGANU) — ORIGINATING SUMMONS NO 24–113 OF 2002
NIK HASHIM J
23 DECEMBER 2002

Land Law *— Restraint on dealings — Caveats — Removal — Chargee consented to sub-lease but subsequently refused to execute Form 15B of the National Land Code 1965 — Defendant sub-lessee lodge private caveat to protect own interest — Whether defendant had caveatable interest — Whether there was a serious question to be tried — Balance of convenience*

The plaintiff was given a 60-year lease by the State Government of Terengganu in respect of a piece of land ('the said land'). The plaintiff charged the said land to the chargee as security for some banking facilities. The plaintiff and the defendant then entered into a sub-lease agreement in respect of part of the said land. The plaintiff obtained the consent of the chargee and the State Government of Terengganu for the grant of the sub-lease in favour of the defendant. Although the chargee had consented to the creation of the sub-lease, it subsequently refused to execute the Form 15B of the National Land Code 1965 ('NLC'). To protect its interest, the defendant (with the agreement of the plaintiff) then lodged a private caveat over the said land. Some two years later, the plaintiff was wound up and receivers were appointed. This was the application by the plaintiff to remove the private caveat lodged by the defendant.

Held, dismissing the plaintiff's application:

(1) There was a serious question to be tried between the parties because the chargee had reneged on the consent given earlier when it refused to sign the Form 15B (see p 8G).

(2) It was clear that the chargee was the party which had failed to execute Form 15B of the NLC to enable the defendant to register its lease under the sub-lease agreement as required under s 222(4) of the NLC. By s 323 of the NLC, a caveatable interest should be an interest that was registrable. Since the consent of the State Authority and the chargee had been obtained, this gave rise to the defendant having a registrable interest in the said land and hence, the defendant had an unequivocal right to caveat the land under s 323 of the NLC (see p 8C–F).

(3) The caveat was lodged on 28 February 2000 and the plaintiff was wound up on 28 March 2002. The defendant was only made aware of the intended sale of the land by the chargee in August 2002. Although the defendant had not commenced any action to pursue its rights, the inaction was reasonable in the circumstances and in any case, the defendant was well within the

limitation period to take the necessary steps to enforce its rights (see p 9A–C).

(4) The chargee and the plaintiff were now estopped by virtue of their conduct from refusing to execute the Form 15B (see p 9A).

(5) It would be an affront to justice to allow the removal of the caveat as the problem in this case was created by the chargee itself. The balance of convenience or the balance of justice was in favour of the caveat remaining on the register. In the event the caveat was removed, the defendant would be gravely prejudiced as the defendant's right in law to commence an action against the chargee requiring the latter to execute the Form 15B as perits consent would become superfluous and redundant (see p 9E–F).

[Bahasa Malaysia summary

Plaintif diberi pajakan 60 tahun oleh Kerajaan Negeri Terengganu berhubung dengan sebidang tanah ('tanah tersebut'). Plaintif menggadai tanah tersebut kepada pemegang gadaian sebagai cagaran untuk kemudahan perbankan. Plaintif dan defendan kemudian mengikat perjanjian pajakan kecil berkaitan dengan sebahagian tanah tersebut. Plaintif memperolehi kebenaran pemegang gadaian dan Kerajaan Negeri Terengganu untuk pemberian pajakan kecil memihak kepada defendan. Walaupun pemegang gadaian telah bersetuju kepada pengwujudan pajakan kecil, ia kemudiannya enggan melaksana Borang 15B Kanun Tanah Negara 1965 ('KTN'). Untuk melindungi kepentingannya, defendan (dengan persetujuan plaintif) kemudiannya mengemukakan kaveat persendirian atas tanah tersebut. Kira-kira dua tahun kemudian, plaintif digulung dan penerima dilantik. Ini merupakan permohonan oleh plaintif untuk membatal kaveat persendirian yang dikemukakan oleh defendan.

Diputuskan, menolak permohonan plaintif:

(1) Terdapat soalan serius untuk dibicarakan di antara pihak-pihak kerana pemegang gadaian telah mungkir kebenaran yang diberi lebih awal apabila ia enggan menandatangani Borang 15B (lihat ms 8G).

(2) Adalah jelas bahawa pemegang gadaian merupakan pihak yang gagal melaksana Borang 15B KTN bagi membolehkan defendan mendaftar pajakannya di bawah perjanjian pajakan kecil seperti yanh dikehendaki di bawah s 222(4) KTN. Melalui s 323 KTN, satu kepentingan boleh kaveat haruslah berupa kepentingan boleh didaftar. Oleh kerana kebenaran Pihak Berkuasa Negeri dan pemegang gadaian telah diperolehi, ini menyebabkan defendan mempunyai kepentingan boleh daftar dalam tanah tersebut dan justeru itu, defendan mempunyai hak yang tidak boleh dipersoal

untuk mengkaveat tanah tersebut di bawah s 323 KTN (lihat ms 8C–F).

(3) Kaveat dikemukakan pada 28 Februari 2000 dan plaintif digulung pada 28 Mac 2002. Defendan hanya sedar tentang niat menjual tanah tersebut oleh pemegang gadaian pada bulan Ogos 2002. Walaupun defendan tidak memulakan apa-apa tindakan untuk menuntut haknya, tindakan tidak membuat apa-apa adalah munasabah memandangkan keadaan dan walau bagaimanapun, defendan masih dalam lingkungan had masa untuk mengambil langkah yang perlu untuk menguatkuasa haknya (lihat ms 9A–C).

(4) Pemegang gadaian dan plaintif diestop disebab kelakuan mereka daripade enggan melaksana Borang 15B (lihat ms 9A).

(5) Adalah satu penghinaan kepada keadilan untuk membenarkan pembatalan kaveat kerana masalah dalam kes ini diwujudkan oleh pemegang gadaian sendiri. Imbangan kemudahan atau imbangan keadilan memihak kepada pengekalan kaveat pada daftar. Sekiranya kaveat dibatalkan, defendan akan terjejas kerana hak defendan di sisi undang-undang untuk memulakan tindakan terhadap pemegang gadaian yang menghendakinya melaksana Borang 15B mengikut kebenarannya akan menjadi berlebihan (lihat ms 9E–F).]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3015–3312.

Cases referred to

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd [1998] 2 MLJ 463 (refd)

Legislation referred to

National Land Code 1965 ss 222(4), 226(1), 323(1)(a), 327, Form 15B

Gideon Tan (*Gideon Tan Razali Zaini*) for the plaintiff.
Bharti Seth (*DS Prasad* with him) (*Bharti Seth & Assoc*) for the defendant.

Nik Hashim J:

The application

This is the plaintiff's originating summons applying for removal of the private caveat entered by the defendant pursuant to s 327 of the National

Land Code 1965 ('the NLC') on the leasehold land of the plaintiff held under Title No HS(D) 2413, Lot No PT 3917, Mukim Teluk Kalung, Kemaman, Terengganu (the said land). The application was supported by the affidavit of Kenneth Teh Ah Kiam (encl 2A), the receiver of the plaintiff. The defendant filed an affidavit in reply (encl 6A) opposing the application.

The facts

The plaintiff was given a 60-year lease by the State Government of Terengganu in respect of the said land for the purpose of constructing an integrated iron and steel plant at the said land. The plaintiff had made representations that it expected to commence commercial production of hot metal from the blast furnaces during the third quarter of 1998 and one of its by-products is molten blast furnace slag (the molten slag). The defendant, being a producer of Portland cement, was desirous of purchasing molten slag and to set up and operate a plant for the processing of the molten slag into various furnished products for the use in the construction industry. Thereafter, the defendant was to market its finished products.

Consequently, both the plaintiff and the defendant entered into a sale and purchase agreement of the molten slag on 9 September 1997 (the molten slag agreement) (exh LMS-1) and a sub-lease agreement on 28 October 1997 (the sub-lease agreement) (exh P6). By the sub-lease agreement the plaintiff would give a sub-lease to the defendant four hectares of the said land for an initial period of 30 years with an option to renew the sub-lease for a further period of 28 years subject to the terms and conditions as contained in the said sub-lease agreement. Pursuant to cl 2.1 of the sub-lease agreement, the plaintiff was to obtain the consent of the state authority and from the chargee bank within a period of six months from the date of the said sub-lease agreement or such extended period as the parties may agree in writing for the grant of the said sub-lease of the said land from the plaintiff to the defendant. The chargee bank in this case is PB Trustee Services Bhd.

It is to be noted that s 226(1) of the NLC restricts any lease which is subject to a charge to be sub-leased unless the chargee consents to the sub-lease.

Subsequently, the consent of the state authority and the chargee bank was obtained by the plaintiff.

Upon the chargee bank's failure to execute a Form 15B to give effect to the sub-lease which the plaintiff intended to create in favour of the defendant and to protect its interests in the sub-lease agreement, the defendant, with the agreement of the plaintiff, lodged a caveat on the said land on 28 February 2000.

On 28 March 2002, the plaintiff's company was wound up. Chew Hoy Ping and Kenneth Teh Ah Kiam were appointed as receivers of the plaintiff. With the consent of the liquidators, the receivers have decided to dispose of the said land to repay the debts owing by the plaintiff to the chargee bank. Obviously, with the caveat on, the said land would not be able to be disposed of. Hence, the application.

Plaintiff's contention

Learned counsel for the plaintiff argued that the defendant has no caveatable interest in the said land and on the balance of convenience, the caveat needs to be removed as the interest of the chargee bank is affected by the caveat. The interest of the defendant in the said land was for operating a plant to process molten slag it would purchase from the plaintiff's iron and steel plant. However, as the iron and steel plant was never operational, therefore the interest of the defendant no longer exists. The defendant cannot be said to be in a position of serious detriment as the defendant had never occupied the said land. Additionally, the plaintiff submitted that there is no purpose or benefit for the defendant to insist on the caveat remaining if the defendant no longer has any use for the said land. The defendant has also never taken any steps nor commenced any action to protect or pursue its rights on its purported sub-lease.

Defendant's contention

Learned counsel for the defendant, on the other hand, argued strongly that based on the evidence the defendant has a registrable interest and therefore has a right to enter a caveat on the said land. There is a serious question to be tried because the plaintiff/chargee bank themselves have reneged on the consent which they have given by not executing the Form 15B. That as a result of the plaintiff/chargee bank's own action and conduct, the defendant's caveat should be allowed to remain on the said land on the balance of convenience.

The findings of the court

In considering an application for the removal of a caveat under s 327 of the NLC, it may be useful to first state its principles. Gopal Sri Ram JCA in delivering the judgment of the court in *Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd* [1998] 2 MLJ 463 (CA) at p 469 said:

> The approach to be adopted by a judge to whom an application is made for the removal of a caveat has been established by this court in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 and *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782. In the latter case, this court said (at pp 788–789):
>
> > 'The principles formulated in *Luggage Distributors* as applied to the present appeal require an investigation into the following matters. First, whether the respondent, on the material set out by him in his application under s 323(1) of the [National Land Code 1965], has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.'

In the present instance, pursuant to the clear provision of cl 2.1 of the sub-lease agreement, it was obvious that the burden was on the plaintiff to obtain the consent of the State Authority and from the chargee bank within a period of six months from the date of the said agreement or such extended period as the parties may agree in writing.

Exhibits LMS-2, LMS-3, LMS-4 and LMS-5 in encl 6A clearly show that the plaintiff had obtained the consent of the State Authority and the chargee bank, who had given the consent to the defendant to have the defendant's lease registered. Exhibit LMS-5 is now reproduced:

MM/98/172
25 June 1998
Associated Pan Malaysia Cement Sdn Bhd
Wisma APMC
No 2 Jalan Kilang
46050 Petaling Jaya
FAO Mr EU Kidav

Dear Sir,

Land Sub-Lease Agreement Dated 28 October 1997

We refer to the above and are pleased to confirm that the consent of the chargee banks have been obtained for the sub-lease. However, we have yet to obtain the State Authorities' consent as required under clause 2.1 of the agreement.

In the circumstances, we seek your agreement to a further extension of 3 (three) months to 27 September 1998 to fulfil the said conditions.

We trust you have no objections to the above and look forward to receiving confirmation of your confirmation of this by endorsing the letter herein (in duplicate) and returning the original copy to us for our record.

Thank you.

Yours faithfully
For Gunawan Iron & Steel Sdn Bhd
sgd
Mariam Milatu
Deputy General Manager
Corporate

Confirmation

With reference to the above, we hereby confirm that we are agreeable to the extension of three (3) months to 27 September 1998 pursuant to clause 2.1 of the above said sub-lease agreement.

For and on behalf of
Associated Pan Malaysia Cement Sdn. Bhd.
sgd
Name: EU Kidav
Designation: Adviser - Special Projects

The consent of the State Authority was obtained by the plaintiff by a letter dated 11 February 1999 which was within the extended period agreed upon by both parties. The said letter is now reproduced:

A PTG.TR.04/32/1999/0001-(5) 11 Februari 1999
24 Syawal 1419

Pentadbir Tanah,
Kemaman.

Tuan,
B Permohonan Kebenaran Pajakan Tanah
Berketerangan HS(D) 2413 Lot PT. 3917
Mukim Teluk Kalung Daerah Kemaman

Adalah saya dengan hormatnya merujuk kepada surat tuan PTK 12/32/1998/0001-(6) yang bertarikh 31 Disember 1999 mengenai perkara yang tersebut di atas, sukacita dimaklumkan bahawa permohonan daripada Gunawan Iron
C & Steel Sdn Bhd — No Pendaftaran: 214494 U bagi memajakkan sebahagian tanahnya kepada Associated Pan Malaysia Cement Sdn Bhd — No Pendaftaran: 7129-X telah DILULUSKAN oleh Pihak Berkuasa Negeri.

2 Bersama-sama ini disertakan salinan keputusan Majlis Mesyuarat Kerajaan Negeri Bil 84/99, yang bertarikh pada 3 Februari 1999 bagi makluman tuan.

D Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'
Saya yang menurut perintah,
Sgd
(AZMI BIN RAZIK)
bp Pengarah Tanah dan Galian,
E Terengganu.

sk: Gunawan Iron & Steel Sdn Bhd, Suite 29 1A, Menara Haw Par, Jalan Sultan Ismail, 50250 Kuala Lumpur.
— Sila tuan berhubung dengan Pentadbir Tanah Kemaman

F On 30 March 1999, the plaintiff wrote to the defendant informing that by end of that week, the registration form would be forwarded to the defendant for its attachment of the common seal before submitting to the Kemaman Land Office. However, on 12 August 1999, the plaintiff wrote to the defendant stating 'that despite the earlier consent given by our lenders for the sub-lease, CIMB has now indicated that its registration needs to be
G referred to the lenders again ...', and this was expressed by CIMB in its fax dated 30 July 1999 to the plaintiff which is now reproduced:

Commerce International Merchant Bankers Bhd

To : Pn Mariam Milatu	From: Winnie Sia/Michael Lim
H Company: Gunawan Iron & Steel Sdn Bhd	Dept: Capital Markets
Fax: 2380246	Phone: 2536688
	Fax: 2540820
Date: 30 July 1999	Pages: 01

I GUNAWAN IRON & STEEL SDN BHD ('GIS') RM370.0 Million and USD 91.0 Million Dual Currency Multi-Option Syndicated Facilities ('the facilities')

> We refer to the above matter and to the sub-lease of a portion of the project land to Associated Pan Malaysia Cement Sdn Bhd ('APMC'). We understand from PB Trustee Services Bhd that you are now requesting them to execute Form 15B in favour of APMC in respect of the said sub-lease.
>
> Notwithstanding that the lenders have consented to the said sub-lease in early 1998, given that GIS has since defaulted in its obligations pursuant to the facility agreement dated 26 November 1996, we may now need to refer the matter to the lenders again. In this respect, the lenders may require a confirmation from the shareholders on their commitment to inject new equity into the project before any further decisions can be made by the lenders.
>
> We shall advise you of the outcome of the matter in due course.
> Regards.

Therefore, from the above correspondence, it is crystal clear that, it is the chargee bank who has failed to execute the Form 15B to enable the defendant to register its lease under the sub-lease agreement as required under s 222(4) of the NLC.

Section 323 of the NLC governs the entry of private caveats and it states that:

> (1) The persons and bodies at whose instance a private caveat may be entered are —
>
> (a) any person or body claiming title to or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest.

By its terms, the section explains that a caveatable interest should be an interest that is registrable.

In this case, the defendant has been given a lease for a period of 30 years and which lease is subject to an option for renewal for a further period of 28 years (see exh P-6, encl 2A).

Since the consent of the State Authority and the chargee bank have been obtained, it gives rise to the defendant having a registrable interest in the said land and hence the defendant has an unequivocal right to caveat the said land under s 323 of the NLC.

Besides the finding that the defendant has a caveatable interest in the said land, I also find that there is a serious question to be tried between the parties because the chargee bank has reneged on the consent which it has given by not executing the Form 15B.

The conduct of the plaintiff, the defendant and the chargee bank established from the documents before the court shows that there was a clear intention of the parties to create the sub-lease in favour of the defendant as contained in the sub-lease agreement. What is important and relevant here is that there was the intention of the parties to create the sub-lease. The consent of all relevant parties was obtained and this was communicated to the defendant who, based on the representation, expanded RM1,563,017 pursuant to the molten slag agreement and paid a security deposit of RM3,000 under the sub-lease agreement. The defendant had taken all necessary steps to give effect to the said sub-lease agreement.

A Further, the assertions of facts by the defendant in encl 6A have not been rebutted at all by the plaintiff thereby admitting wholly to the contents of the said encl 6A (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA)). Thus, the chargee bank and the plaintiff are now estopped by virtue of their conduct from refusing to execute the Form 15B.

B While it is true that the defendant has not commenced any action to pursue its rights, I consider the defendant is well within the limitation period to take the necessary steps to enforce its rights. Unlike *Paya Terubong* where no action was ever commenced by the respondent even up to the date of hearing of the appeal on 25 November 1996, ie six years after the caveat was lodged on 20 August 1989, in the present case, the caveat was lodged on C 28 February 2000 and the plaintiff's company was wound up on 28 March 2002. The defendant was only made aware of the chargee bank's intended sale of the said land when encl 2, which was filed in court on 1 August 2002, was served on the defendant. Therefore, the defendant's inaction under the circumstances is reasonable and thus acceptable.

D With regard to the plaintiff's contention that the defendant cannot be said to be in a serious detriment as the defendant had never occupied the said land, I find that since there was no molten slag and since the plaintiff failed in the construction of the plant, it was impossible for the defendant to occupy the said land as there was no purpose for the defendant to do so as a result of the plaintiff's failure.

E Having considered the action and conduct of the chargee bank in this case, I find it would be an affront to justice to allow the removal of the caveat. The problems in this case have been created by the chargee bank itself. The non-compliance with the provisions of the NLC mentioned in the plaintiff's affidavit in support is due to no fault of the defendant. In the circumstances, I come to the inescapable conclusion that the balance of convenience, or F more appropriately, the balance of justice, lies in favour of the caveat remaining on the register. I agree with the defendant's learned counsel's submission that in the event the caveat is removed, then the defendant would be gravely prejudiced as the defendant's right in law to commence an action against the chargee bank requiring the latter to execute the Form 15B as per its consent given would become superfluous and redundant.

G *Plaintiff's application dismissed.*

Reported by Lim Lee Na

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